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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TERRELL JONES, Defendant and Appellant.	B284286 (Los Angeles County Super. Ct. No. TA139964)

APPEAL from the judgment of the Superior Court of Los Angeles County, John J. Lonergan, Jr., Judge. Affirmed in part with directions.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Terrell Jones on count 1 of the first degree murder of Ian Davis (Pen. Code, § 187, subd. (a)[1]), with true findings as to personal firearm use, personal and intentional discharge of a firearm, and personal and intentional discharge of a firearm causing great bodily injury and death (§ 12022.53, subds. (b)-(d)), and on count 2 of possession of a firearm by a felon (§ 29800, subd. (a)(1)). The jury found as to counts 1 and 2 that Jones committed the offenses for the benefit of, at the direction of, or in association with, a criminal street gang (§ 186.22, subd. (b)(1)). The jury convicted Jones on count 3 of possession of a firearm by a felon (§ 29800, subd. (a)(1)).[2] Jones admitted a prior serious felony conviction, constituting a strike (§§ 667, subds. (a)(1), (b)-(j), 1170.12).

On appeal, Jones claims the trial court erred by admitting lay opinion testimony that he was a person depicted in a private surveillance video of a December 29, 2015 killing. He also claims the court abused its discretion by admitting into evidence (1) a March 2016 police surveillance video depicting Jones, (2) Jones's Instagram messages, and (3) rap videos depicting Jones. Finally, Jones claims this matter must be remanded so the trial court can exercise its discretion as to whether to strike the section 12022.53, subdivision (d) firearm use enhancement pursuant to

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

[2] On December 22, 2016, during Jones's first trial, a jury convicted him on count 3. The jury deadlocked on counts 1 and 2, with 10 jurors voting guilty and two voting not guilty. The court declared a mistrial as to those two counts. On March 3, 2017, during a retrial, a jury convicted him on counts 1 and 2.

Senate Bill No. 620. We affirm the convictions and remand for the trial court to exercise its latter discretion.

BACKGROUND

I. Prosecution

A. *The December 29, 2015 Shooting*

About 5:45 or 6:00 p.m. on December 29, 2015, A.M. and Davis were on the patio at 955 East 120th Street. The patio was near an alley. The patio was enclosed and had a gate. The location was in disputed territory of the Kitchen Crips (KC) and Miller Gangster Bloods (Miller) gangs. The alley contained KC gang graffiti.

L.B. observed a car stop in the alley. An older man, known as Poppy or Lil Poppy, and some young men exited the car. Poppy told the men to "tag" the walls; they complied. Los Angeles Police Detective Samuel Marullo identified Poppy as Johntee Etress and testified that the tagging occurred at 5:51 p.m.

Detective Marullo further testified that surveillance video (People's Exhibit No. 7) had been recovered from an apartment building at 971 East 120th Street. The video depicted two armed men walking northbound through the alley. One of the men, whom Detective Marullo identified as Jones, wore a distinctive sweatshirt, bearing a portion of the letter T, and the letters K and E (TKE). Jones also wore tan cargo shorts and Puma Classics shoes. The two men walked in the direction of the patio where Davis was sitting.

According to Detective Marullo, additional surveillance video (People's Exhibit No. 21) from 959 East 120th Street

depicted the following: the second man walked westbound toward the patio.[3] Jones walked westbound, then northbound between two cars. At that point, Jones looked to his right revealing more of his profile.[4] After Jones walked northbound between the cars, he joined his confederate.

Jones and his confederate approached the patio. The two stood adjacent to the location of the KC gang graffiti. A.M. testified that he and Davis were sitting in the patio, talking. Davis stopped talking, stood, and walked toward the patio gate. Then he was shot in the head.

Detective Marullo testified that the surveillance video (People's Exhibit No. 21) showed that about 6:05 p.m., Jones's confederate raised his arm as if he was firing a pistol. At that point, Jones "goes low and appears to reach his arm around." Both nine-millimeter and .45-caliber casings were found at the location.

Jones and his confederate fled after the shooting. A surveillance video (People's Exhibit No. 21) depicted someone wearing a burgundy sweatshirt running back toward the camera. The person's face was not visible. At 6:09 p.m., police broadcast information about the shooting.

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[3] Although there were multiple videos generated on December 29, 2015, the parties occasionally referred to them collectively as one.

[4] Detective Marullo testified that Jones "never looks directly at the camera; only when he is running away which you'll see. The pixels are too great. You can't see the quality."

B. *The Investigation*

Los Angeles Police Detective Iris Romero also investigated this case. Her duties frequently required her to identify people based on photographs contained in social media, and Detective Marullo deferred to her expertise in making such identifications.

Detective Romero had no contact with Jones before December 29, 2015. She began examining Instagram sites and found what she believed were Miller gang "hashtags." These led her to Jones's webpage. In January 2016, Detective Romero began investigating Jones's Instagram accounts. One account had about 736 pages; the other had about 2,300 pages. Romero viewed multiple photographs of Jones in his accounts. One depicted Jones wearing "the red shirt, [and the] light-colored shorts with red shoes." Another depicted Jones wearing the sweater depicted in the December 29, 2015 video.

Detective Romero also viewed videos posted on Jones's Instagram accounts. In one video, Jones identified himself as "King Milla." Detective Romero testified that another video entitled "Milla-rapping" "has [Jones] wearing a maroon-colored sweatshirt with the lettering on it as seen on other videos and in the photograph." Detective Romero also viewed the Shooters video.[5] That video incorporated a montage of seven successively displayed photographs, each depicting an African-American man and a moniker. A song including the repeated lyrics, "my shooters," accompanied the montage, which ended with a photograph of a writing that included the words "Miller" and "gangster." These videos (People's Exhibits Nos. 7, 23 & 41) were admitted into evidence.

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[5] Jones concedes the "Shooters" video depicted him.

Detective Romero also viewed photographs obtained from the December 29, 2015 surveillance videos. Two photographs depicted Jones carrying a gun and walking in the alley. Another showed Jones walking and putting the gun under his sweater, which bore three letters. After Detective Romero viewed the photographs and videos, she stated with a 99 percent certainty that the individual in the December 29, 2015 surveillance video was Jones. Detective Romero acknowledged she could not directly see the face of either shooting suspect.

On March 22, 2016, Detectives Romero and Marullo went to the area of 130th and San Pedro Streets, where they saw Jones. Detective Romero observed Jones for "probably well over 10 to 12 minutes." Jones walked back and forth and talked with people. Detective Romero videotaped Jones, and the court admitted the video (the March 2016 video) into evidence at trial. This video shows Jones walking to and entering a car. When Detective Romero observed Jones, she determined with certainty he was the person depicted in the December 29, 2015 video.

On April 28, 2016, police arrested Jones. They searched a one bedroom apartment on Vermont Avenue, where Jones lived with his stepfather, Greg Williams. At the apartment, police recovered a maroon or burgundy sweatshirt with the letters "TKE" on the front, and tan cargo shorts; the sweatshirt and shorts appeared to be those depicted in People's Exhibit No. 7.[6] Police also found a handgun not used in the murder. After the search, Jones's mother arrived.

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[6] While the police recovered Puma shoes, Detective Marullo testified that they "did not recover the Puma Classics that we believe were being worn" at the time of the shooting.

During Detective Marullo's later interview of Jones, Jones said that he had heard about the shooting on 120th Street. He admitted frequenting the area. Jones initially stated that he did not know whether he was in the area before Davis was shot. Jones later acknowledged he was in the area at that time because he had gone to visit the family of A.Y.; the family lived nearby.

Jones also said that he did not think he had a red sweatshirt. However, when Detective Marullo told Jones that police saw him walking and wearing such a shirt bearing letters, Jones replied, "[o]bviously if I did . . . I guess I had it on." Jones denied possessing white Puma shoes. He acknowledged that he formerly owned a pair, from "December 29th 'til April." He got rid of them because they wore out.

Jones told Detective Marullo that he "knew of" Davis. He did not believe Davis was a gang member.

On April 28, 2016, Jones had a recorded jailhouse phone conversation with "Malika." Malika said that Jones's mother had stated that while she had gone to the store for 10 minutes, detectives came to the apartment and Greg let them inside. Malika asked why Williams did not tell the police to leave, adding, "They can't break the door down or nothing. They just got to come back another day, and by that time, somebody could have went over there, . . . got the shit . . . ." Jones replied that "regardless of the fact right now . . . after this little shit over, . . . I'm gonna have to stay and do some time . . . for that shit, but it . . . all depends, though, on what's said . . . ."

Malika later said she thought about saying that the things in the apartment were hers; she had no criminal record, she could make bail, and "what can they do?" Jones replied he did not know. He told Malika, "they asked Blood where is all my shit at,

and he pointed right to where my shit is." Jones added, "see, my momma know what's over there, though. She would have never just told them that's my shit . . . ."

On December 29, 2015, A.Y. lived at 959 East 120th Street. On April 29, 2016, Detective Marullo showed A.Y. a photograph depicting Jones. A.Y. told him that she had never seen the person in the photograph and the person had never been to her home.

C. *Gang Evidence*

Detective Marullo, who was also a gang expert, testified that the KC and Miller gangs were rivals. Detective Marullo opined that Jones belonged to the Miller gang. The primary activities of the Miller gang included murder and unlawfully carrying firearms. In response to a hypothetical question based on evidence in this case, Detective Marullo opined that the murder was committed for the benefit of, and in association with, Jones's gang.

D. *Jones's December 15, 2015 Instagram Messages*

On December 15, 2015, Jones, identifying himself as "King Milla," sent a text indicating that KC gang members, armed with guns, were driving around and looking for Miller gang members. Jones said he was about to get a gun. That same day, Jones texted another Bloods gang member known by the moniker "Rock Solid120st." Jones indicated that people were driving around with guns and confronting people. Jones texted that he was on his way and was going to see if he could get a gun. RockSolid120st responded, "[t]hey keep coming out the alley . . . ." Detective Marullo testified there was an alley in the

800 and 900 blocks of East 120th Street, and gang members went there to engage in shoot-outs.

RockSolid120st later texted Jones: "It's Evil Bitch Ass and Lil Poppy." Jones texted that he was coming with a gun; he asked if there was a car they could use to do a mission, but he said they would not shoot from the car.

II. Defense

Jones presented defense exhibits. He did not testify or call witnesses on his behalf.

DISCUSSION

I. The Trial Court Properly Admitted Detective Romero's Lay Opinion Testimony

A. *Proceedings Below*

On December 7, 2016, Jones made a pretrial motion to exclude Detective Romero's lay opinion testimony identifying Jones "in any surveillance footage . . . retrieved from the 955B E. 120th Street apartment building on December 29, 2015." Jones argued, inter alia, the testimony was inadmissible under Evidence Code section 800 for lack of foundation, i.e., Detective Romero had no contacts with Jones before December 29, 2015, and she could not identify Jones when she first viewed the footage. Jones also sought exclusion of the testimony pursuant to Evidence Code section 352.

At the hearing on the motion, the prosecutor argued that Jones was visible in the December 29, 2015 surveillance video; his haircut and clothing, and a shirt bearing three letters, were clearly discernible distinctive features. The prosecutor noted

that, during a two-month period, Detective Romero had reviewed Instagram posts of the Miller gang. Some of the posts included photographs showing the shirt, pants, and shoes that Jones was wearing at the time of the shooting. Detective Romero compared the photographs to the December 29, 2015 surveillance video, using a magnifying glass. When police later arrested Jones, they searched his residence and found the shirt worn in the surveillance video. Detective Romero would testify that, based on her observations, she was certain that the surveillance video depicted Jones. The prosecutor added that there were no eyewitnesses who could identify Jones, and Detective Romero's testimony that the December 29, 2015 surveillance video captured Jones's image would be the crux of the prosecution's case.

The trial court noted that it had to balance the testimony's probative value against its prejudicial value. The prosecutor was representing that one of two people in the surveillance videos was wearing distinctive clothing, police later observed social media depicting Jones wearing similar clothing, and police found matching clothing in Jones's residence.

The court recognized that the proposed testimony was probative, subject to the prosecutor laying a foundation. Unlike a photograph, a video depicted events from different angles. The jury would decide whether to accept Detective Romero's opinion, and the court could give a limiting instruction. On the other hand, there was no indication that Detective Romero had any contacts with Jones before the crime, and the detective was not a civilian witness. The court tentatively concluded that the challenged testimony was admissible. Jones's counsel objected

that the surveillance video did not depict individuals' faces. The court noted Jones's objection but did not change its ruling.

Later, during a break in jury selection, the court and parties returned to the issue of Detective Romero's lay opinion testimony. Jones denied he was objecting to lay opinion testimony from Detective Romero. Jones conceded that Detective Romero could properly testify that the December 29, 2015 video appeared to show Jones; he also conceded that Detective Romero could properly testify that the video depicted a person whose height, weight, and build were similar to those of Jones. Jones argued, however, that because Detective Romero had not previously been familiar with Jones, it was "problematic" for her to testify that she was certain of her identification.

Detective Romero testified at trial concerning her identification of Jones from the December 29, 2015 surveillance videos. The trial court instructed the jury on lay opinion testimony pursuant to CALCRIM No. 333.[7]

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[7] CALCRIM No. 333 as given, stated: "Witnesses who were not testifying as experts gave their opinions during the trial. You may but are not required to accept those opinions as true or correct. You may give the opinions whatever weight you think appropriate. Consider the extent of the witness' opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion and the facts or information on which the witness relied in forming that opinion. You must decide[ ] whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable or unsupported by the evidence."

B. *Analysis*

Jones claims that Detective Romero's lay opinion testimony identifying Jones as one of the shooters in the December 29, 2015 surveillance videos was not admissible as lay opinion testimony under Evidence Code section 800.[8] Jones maintains that because Detective Romero had no special knowledge of Jones's appearance when the shooting occurred, and because she had no contact with Jones before or near the time of the shooting, Detective Romero's opinion was not necessary to help the jury understand that the detective believed Jones was one of the shooters. Jones also claims the trial court erroneously failed to exclude the testimony under Evidence Code section 352,[9] and this failure violated his right to a fair trial. We reject Jones's claims.

We review the trial court's ruling on the admissibility of lay opinion testimony under the abuse of discretion standard. (Cf. *People v. Thornton* (2007) 41 Cal.4th 391, 429.) We also review a ruling under Evidence Code section 352 for abuse of discretion. (*People v. Powell* (2018) 5 Cal.5th 921, 961.)

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[8] Evidence Code section 800 provides: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony."

[9] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

People v. Leon (2015) 61 Cal.4th 569 (*Leon*) addressed the admissibility of a detective's lay opinion identification testimony. The California Supreme Court held that " '[t]he identity of a person is a proper subject of nonexpert opinion . . . .' (*People v. Perry* (1976) 60 Cal.App.3d 608, 612 . . . (*Perry*); accord, *People v. Mixon* [(1982)] 129 Cal.App.3d [118,] 127 (*Mixon*).)" (*Id.* at p. 601.)

The Supreme Court observed: "Court of Appeal decisions have long upheld admission of testimony identifying defendants in surveillance footage or photographs. In *Perry*, the defendant argued an identification had to be based on the officer's *perception of a crime*. [Citation.] The court disagreed, finding it proper for officers to predicate their opinion on 'contacts with defendant, their awareness of his physical characteristics on the day of the robbery, and their perception of the film taken of the events.' [Citation.] The testimony was also helpful because *the defendant had changed his appearance* . . . . [Citation.] Similarly, the court in *Mixon* upheld identification of the defendant in a robbery surveillance photograph by officers who had numerous contacts with him and were *unequivocal in their identification*. [Citations.]" (*Leon*, *supra*, 61 Cal.4th at p. 601, italics added.) The photograph in *Mixon*, ostensibly featuring the defendant, was not a clear photograph. (*Mixon*, *supra,* 129 Cal.App.3d at p. 131.)

The court in *Leon* rejected the defendant's argument that the detective's lay opinion testimony was inadmissible because the detective lacked contact with the defendant *before* the crime. (*Leon*, *supra*, 61 Cal.4th at p. 600.) The court explained: "This is a distinction without a difference. It is undisputed [the detective] was familiar with [the] defendant's appearance *around the time*

of the crimes. Their contact began when [the] defendant was arrested, one day after the . . . robbery. Questions about the extent of [the detective's] familiarity with [the] defendant's appearance went to the weight, not the admissibility, of his testimony. (*Perry*, *supra*, 60 Cal.App.3d at p. 613.) Other eyewitness testimony indicated [the] defendant had changed his appearance after the crime[ ]. . . . Moreover, because the surveillance video was played for the jury, jurors could make up their own minds about whether the person shown was [the] defendant. Because [the detective's] testimony was based on his relevant personal knowledge and aided the jury, the court did not abuse its discretion by admitting it." (*Leon*, *supra*, at p. 601, italics added.)

In *People v. Larkins* (2011) 199 Cal.App.4th 1059 (*Larkins*), a loss prevention manager testified that he recognized the defendant in two surveillance videos taken at a . . . fitness club. The manager testified that he recognized the defendant because he had seen the defendant in 20 to 30 videos obtained from other clubs. The manager also testified that he had never seen the defendant in person. A jury convicted the defendant of burglary of the [fitness] club. (*Id.* at pp. 1063, 1065, 1066.)

On appeal, defendant Larkins claimed the trial court abused its discretion by admitting the manager's testimony concerning the 20 to 30 videos over the defendant's foundation objection. (*Larkins*, *supra*, 199 Cal.App.4th at p. 1066.) The court rejected this claim, distinguishing *Mixon* and *Perry* (*Larkins*, *supra*, at pp. 1066-1067). The court observed, inter alia, that *Mixon* and *Perry* involved identifications based on photographs. (*Larkins*, *supra*, at p. 1067.) The court stated: "It is one thing to see a single photo of a person and attempt to

identify that person based on it. But, here, the manager saw 20 to 30 videos of [the] defendant, during which time he could observe such distinguishing characteristics as [the] defendant's posture, gait and body movements. Thus, whatever the holdings of *Perry* and *Mixon*, they are logically inapplicable to videos." (*Ibid*.)

Fairly read, the record here reflects that the proffered basis for Detective Romero's lay opinion identification testimony was her personal observation of (1) Instagram photographs and several videos of Jones, including some with him wearing distinctive clothing, (2) Jones himself, and (3) the December 29, 2015 surveillance video.[10] The basis also included matching clothing found in Jones's residence.

Notwithstanding Jones's argument to the contrary, *Leon* and *Larkins* do not dictate a holding that Detective Romero's opinion had to be based on personal knowledge of Jones's appearance or contacts with Jones *before* December 29, 2015. Moreover, there was no suggestion, from Jones or otherwise, during the December 7, 2016 admissibility hearing that Jones had changed his appearance before trial. Absent such a change, the admissibility of Detective Romero's lay opinion testimony did not hinge upon a showing that she had personal knowledge of Jones's appearance, or had contacted him, *around the time* of those alleged offenses. (See *Larkins*, *supra*, 199 Cal.App.4th at p. 1067.)

Further, under *Larkins*, the *bases* for Detective Romero's lay opinion did not need to include *personal observations of Jones*.

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[10] We have reviewed the electronic media including videos and Instagram posts.

Unlike the police in *Leon*, the manager in *Larkins* relied on prior videos depicting the defendant. (*Larkins*, *supra*, 199 Cal.App.4th at p. 1067.) Detective Romero did the same, in part. Based on the prosecutor's proffer, the trial court reasonably could have concluded that Romero's lay opinion testimony was "[r]ationally based on [her] perception" within the meaning of Evidence Code section 800, subdivision (a).

Moreover, similar to *Mixon*, the surveillance videos here did not clearly capture Jones's image. For this reason, Detective Romero's lay opinion testimony "could offer aid to the jury as to the identity" of the shooter. (*Mixon*, *supra*, 129 Cal.App.3d at p. 131; see Evid. Code, § 800, subd. (b).) Therefore, the trial court did not abuse its discretion in admitting the testimony. (*Mixon*, *supra*, at p. 132.)

With respect to Evidence Code section 352, the trial court expressly stated that it was balancing the testimony's probative value against its prejudicial impact. As stated above, the court reasonably found that Detective Romero's lay opinion testimony was probative on the issue of whether Jones was a shooter depicted in the surveillance video. The testimony was not cumulative of other eyewitness identification testimony; there was no other such testimony.

Jones asserts that once Detective Romero identified Jones as one of the shooters, she "gave the jury someone to punish for the crime, [and] there was no chance that the jury would give [Jones] the benefit of any doubt called for by the poor quality of the video. The jury would give [Detective] Romero's opinion special consideration simply because she was a detective." We reject Jones's assertion. All of the electronic media were available to the jury, which could draw its own conclusions.

Moreover, the court gave to the jury CALCRIM No. 226, concerning witnesses. That instruction, in relevant part, stated: "In deciding whether testimony is true and accurate, use your common sense and experience. *You must judge the testimony of each witness by the same standards*, *setting aside any bias or prejudice you may have*." (Italics added.) As mentioned (see fn. 7, *ante*), the court, using CALCRIM No. 333 concerning lay witness opinion testimony, also advised the jury: "Witnesses who were not testifying as experts gave their opinions during the trial. *You may but are not required to accept those opinions as true or correct. You may give the opinions whatever weight you think appropriate. . . . You may disregard all or any part of an opinion that you find unbelievable, unreasonable or unsupported by the evidence."* (Italics added.) "Jurors are . . . presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Jones does not claim that the trial court erred in admitting the surveillance video because it was unduly graphic and inflammatory, and thus prejudicial. (See *People v. Lewis* (2001) 25 Cal.4th 610, 641-642.) We perceive no abuse of discretion in the trial court's decision under Evidence Code section 352 to admit Detective Romero's identification testimony as more probative than prejudicial. (Cf. *People v. Powell*, *supra*, 5 Cal.5th at p. 961.)

II. The Trial Court Did Not Abuse Its Discretion in Admitting the March 2016 Video, the Instagram Messages, and the Rap Videos

A. *The March 2016 Video*

1. *Proceedings Below*

At the February 22, 2017 pretrial hearing, the prosecutor indicated he intended to introduce the March 2016 video into evidence. Jones's counsel represented the following: in March 2016, Detectives Romero and Marullo responded to an unrelated incident. The March 2016 video depicted the incident, police cars, and police tape. The video also depicted Jones and other African-American males, but they were not involved in the incident. In the video, "Mr. Jones walks away from that area and enters a . . . civilian car."

Jones's counsel maintained that "if [the prosecutor] wants to show that portion of it, that's fine." However, counsel asked the court to redact a portion of the video showing police tape and police cars under Evidence Code section 352.

The prosecutor argued the March 2016 video was relevant because Detective Romero had reviewed Facebook and Instagram posts, and the surveillance videos, but she had never personally observed Jones. It was not until Detective Romero saw Jones in March 2016 that she became certain he was the shooter. The March 2016 video was "the only visual evidence of [Jones] standing in his natural state." Police arrested Jones on April 28, 2016, and the prosecutor represented during the February 22, 2017 hearing that Jones's appearance had completely changed after his arrest.

The trial court viewed the March 2016 video, determining that there were "about 10 seconds" of video. The court concluded

that the March 2016 video was relevant to the issue of identity. The video was taken within a "close time frame" of the present incident. The quality of the tape was good. There were "a couple [of] seconds in the beginning where [Jones] is walking down a street [with a] clear frontal view [of him]," then he enters a Mercedes. Therefore, the March 2016 video was admissible to show that it and the surveillance videos depicted the same person. Pursuant to Evidence Code section 352, however, the court excluded the portions of the video showing police officers and a police car.

The March 2016 video portrays the front of a civilian car and Jones standing at its front passenger door. Jones briefly smiles, apparently in the general direction of where a police officer (the first officer) is standing, then Jones opens that door and enters the car. The video shows mainly the right side of Jones's face and body before he opens the door, then his body and face are facing the camera as he enters the car, except that the view of his body from his waist to his ankles is blocked by the door as he enters.

In the video, the first officer and a second officer, both in uniform, are mainly on the driver's side of the civilian car. The first officer is situated in the far right portion of the video, with his back to the camera and standing near a second car. The first officer appears to look in the general direction of Jones while Jones is apparently looking in the general direction of the first officer as previously indicated. The second officer smiles, casually walks away from the first officer and somewhat in Jones's direction, then turns toward the first officer. The only portion of the second car depicted on the video is the front driver's side, from the front of the car to the front of the left front

wheel well. The depicted portion of the car is black but nothing in the video reveals that it is a police car.

2. *Analysis*

Jones contends the trial court should have excluded the entire March 2016 video pursuant to Evidence Code section 352. He argues the video had no real probative value, and the prosecutor misrepresented that there was no other evidence depicting Jones from head to toe.[11] Jones also argues the presence of police officers in the video was prejudicial, because it suggested Jones had been involved in criminal activity. He asserts this is particularly true because immediately after Detective Marullo testified about observing Jones on March 22, 2016, Detective Marullo testified about arresting Jones and giving him a *Miranda*[12] advisement. We reject Jones's claim.

We review an admissibility ruling as of the time it was made, including in that review a consideration of the offer of proof. (Cf. *People v. Homick* (2012) 55 Cal.4th 816, 877; *People v. Fruits* (2016) 247 Cal.App.4th 188, 191, 199-201, 208; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1024.) Based on the offer of proof, the March 2016 video was probative and admissible on the issue of identity, especially since, according to the prosecutor, Jones had changed his appearance after his arrest. Detective Marullo's subsequent testimony as to arresting Jones and giving him a *Miranda* advisement are not factors in our determination

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[11] According to Jones, other videos and photographs showed his "appearance from head to toe."

[12] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].)

as to admissibility, because these factors were not presented to the trial court at or before the time of its ruling. " 'To do otherwise would require us to hold the trial court to an impossible standard.' [Citation.]" (*People v. Fruits, supra*, 247 Cal.App.4th at p. 208.) Nor was the trial court obligated to reconsider, sua sponte, its ruling merely because of that subsequent testimony. (See *People v. Morris* (1991) 53 Cal.3d 152, 189-190.)

As to undue prejudice, nothing in the March 2016 video demonstrates Jones was involved in criminal activity. It is not clear in the video whether there was any interaction between the two officers and Jones; there certainly was no indication of conflict or hostility. Jones eventually entered a civilian car. The trial court ordered redaction of the video's depiction of additional officers and police cars. While two officers remained in the video, they did nothing more than talk with Jones, if that. They did not detain him, pat him down, or handcuff him; nothing in the video suggested that Jones was "subject to [any] degree of police scrutiny." (*Mixon*, *supra*, 129 Cal.App.3d at p. 132.) Jones cites no case holding that undue prejudice arises simply because police surreptitiously filmed him while he was in a public place in the daytime. The trial court did not abuse its discretion by finding the March 2016 video more probative than prejudicial and admitting it into evidence. (See *id.* at pp. 134-135.)

B. *The Instagram Messages*

1. *Proceedings Below*

At the pretrial hearing, Jones's counsel informed the court that the People intended to introduce into evidence Instagram messages reflecting a December 15, 2015 conversation between

two persons identified only by their gang monikers. The conversation pertained to KC gang members "coming over or pulling a gun out on somebody" and "trying to take over the set." Counsel represented that the People were alleging that Jones had responded: "Yeah, we've got to do something or the little homies got to do something and we've got to get a car. We are going to come with a gun." Counsel argued that the People were suggesting that, during the conversation, Jones was talking about Davis and people involved in the December 29, 2015 shooting. Jones asked the court to exclude the conversation as inadmissible bad character evidence and under Evidence Code section 352.

In response to court questioning, Jones's counsel acknowledged that the People contended that the December 29, 2015 shooting was a retaliatory shooting involving the same gangs as those referred to in the December 15, 2015 Instagram conversation.

The court stated that, based on what it knew, "I . . . see . . . the relevancy. There is a gang allegation. This is a homicide, an alleged gang shooting. This is a text and conversation regarding the same two gangs around the same time frame, so at this time all the social media that I've been able to review that was part of the court file and the exhibits from the first trial I'm going to allow." The People presented evidence of the Instagram messages as discussed in the Background section. The court instructed the jury on first degree willful, deliberate, and premeditated murder and, using CALCRIM No. 401, on aiding and abetting.

2. *Analysis*

Jones claims the trial court should have excluded the Instagram messages pursuant to Evidence Code section 1101, subdivision (a), as inadmissible character or propensity evidence.[13] We review a trial court's ruling on an Evidence Code section 1101, subdivision (a) issue for abuse of discretion. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.)

The Instagram messages were admissible, not as bad character evidence or propensity evidence, but as evidence relevant to prove motive and the absence of mistake or accident as to the charged offenses and the firearm and gang enhancement allegations, and to prove premeditation and deliberation as to the murder. (Cf. Evid. Code, § 1101, subd. (b).)

Moreover, whether Jones harbored intent to kill was an issue pertinent to the murder charge. Some of the firearm enhancements had "intentional discharge[ ]" elements. (§ 12022.53, subds. (c) & (d).) The section 186.22, subdivision (b)(1) gang enhancements required "specific intent to promote, further and assist in criminal conduct by gang members." The

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[13] Evidence Code section 1101, subdivision (a), prohibits, with specified exceptions, admission of "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) . . . when offered to prove his or her conduct on a specified occasion." Subdivision (b) of section 1101 provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

court gave CALCRIM No. 401 to the jury. It instructed that aiding and abetting required "inten[t] to aid and abet the perpetrator." Indeed, Jones asserts "the events described in the Instagram messages and the events leading up to the shooting were virtually identical." The messages were admissible on the issue of intent as to the charged offenses and above enhancements (see *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 [" '[T]he recurrence of a similar result . . . tends . . . to establish . . . criminal[ ] intent accompanying such an act . . .' "]) The trial court did not abuse its discretion by implicitly declining to exclude the Instagram messages under Evidence Code section 1101, subdivision (a).

Jones also claims the trial court should have excluded the Instagram messages under Evidence Code section 352, in that "the probative value of the evidence was greatly outweighed by the probability that the evidence would confuse or mislead the jury and result in substantial prejudice to [Jones]." Jones argues that the "two-week time gap" between the December 15, 2015 messages and December 29, 2015 events "was obscured because the events described in the Instagram messages and the events leading up to the shooting were virtually identical." We reject the argument.

The trial court told defense counsel that she could cross-examine the People's gang and social media experts "and basically make the same argument she just made to the court." That is, she could emphasize to the jury that the Instagram messages dated two weeks before the shooting did not refer to Davis. The trial court reasonably concluded that the probative value of the messages outweighed the likelihood their admission would confuse or mislead the jury. The trial court did not abuse

its discretion in overruling Jones's Evidence Code section 352 objection. (Cf. *People v. Lenart, supra,* 32 Cal.4th at p. 1123.)

C. *The Rap Videos*

1. *Proceedings Below*

a. *The Shooters Video*

At the pretrial hearing, Jones's counsel noted that at the first trial, the People had played for the jury a rap video, referred to as the Shooters video, that contained something like a "roll call" of perhaps seven Miller members, including Jones. The lyrics included the phrase, "my shooters, my shooters." At the first trial, a witness testified that the Shooters video depicted Jones wearing a sweatshirt similar to the one in the December 29, 2015 surveillance video. Jones argued that, to the extent the People were introducing the Shooters video to show Jones wearing the sweatshirt, the video was cumulative and the court should exclude it under Evidence Code section 352.

The trial court stated that it had not seen the Shooters video but, if the roll call contained a moniker, it was relevant to show that Jones was a member of the gang and thus relevant to the gang allegation. If the video captured him among gang members using gang names, it was relevant to show he was a member of that gang. If the video showed him wearing similar clothing, it was relevant to the issue of identity.

Counsel emphasized that her objection was "based on [Evidence Code section] 352, cumulative and prejudice," not relevance. Jones's counsel stated that "really it's the audio that's attached to that roll call that I think is prejudicial." The court stated: "I don't consider this overly prejudicial because this goes

to the ultimate issue: identification, gang affiliation and contacts with [Jones.]"

The Shooters video, which is about 14 seconds long, was admitted into evidence.

b. *The Milla-rapping Video*

Later, Jones's counsel discussed the Milla-rapping video, which included the lyrics: " 'My niggas ain't rappers. They are the real thugs. Maximum capacity is filled up. Kill switch on a stick. I'm trying to kill some. How you fucking with them suckas. But it's still love.' " Counsel sought to exclude the video's audio portion under Evidence Code section 352. The court overruled the objection, noting that Jones was on trial for murder with a gang allegation, and for possession of a firearm by a felon.

This video is about 15 seconds in length. The court admitted it into evidence.

2. *Analysis*

Jones claims the trial court should have excluded the Shooters and Milla-rapping videos pursuant to Evidence Code section 352. As to the Shooters video, he argues that the prosecutor introduced into evidence "a substantial number of photographs" of Jones to establish he was a Miller member, and the Shooters video was cumulative with respect to "other extensive gang evidence." As to the Milla-rapping video, Jones argues its audio portion was inflammatory and prejudicial and should have been redacted. We reject Jones's claims.

As to the Milla-rapping video, Jones concedes it may have been "relevant to show the sweatshirt that [Jones] was wearing" and thus his identity as a shooter.

Moreover, both videos were highly probative evidence of Jones's state of mind, criminal intent, criminal gang membership, and his loyalty to the gang. These matters were relevant to the charges against him. (Cf. *People v. Zepeda* (2008) 167 Cal.App.4th 25, 35.) The videos were not unduly prejudicial. Each was of short duration, about 15 seconds in length. They provided oral evidence as to Jones's state of mind. "The language and substance of the lyrics, although graphic, did not rise to the level of evoking an emotional bias against [Jones] as an individual apart from what the facts proved." (*Id.* at p. 35.) The trial court did not abuse its discretion in admitting the videos. (*Ibid.*)

III. Remand for Resentencing

The probation officer's report indicates that Jones was 24 years old at the time of the charged offenses. Jones's adult criminal history reflects that from 2009 to 2016, Jones suffered convictions for felony vehicle theft, possession of a firearm by a felon, second degree robbery, forgery, misdemeanor driving without a license, and possessing a controlled substance. He received multiple state prison sentences.

At Jones's sentencing hearing on July 27, 2017, the trial court indicated it had read and considered the parties' sentencing memoranda. Jones's counsel argued that Jones was young and involved in a gang, but he had had a tumultuous childhood and had been in the foster care system. He probably joined the gang for safety and camaraderie. His juvenile offense history was minimal, but once he was released from juvenile hall, "the streets raised him." While acknowledging the killing in the present case

was senseless, counsel argued there was evidence from pretrial hearings that Jones had shown remorse.

Jones's counsel asked the court to strike Jones's strike—a 2011 robbery conviction—pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. Counsel argued that Jones was 19 years old when he committed the robbery, and he had had minimal contact with police after his incarceration for that offense. The prosecutor opposed the *Romero* motion.

The court indicated that it had heard the trial evidence and the statements from Davis's family. The court stated, in sentencing Jones: "I think Mr. Jones is getting a break by the court[,] with the People's approval[,] running count 3, the six years, concurrent and not seeking the 15 years, 10 years on the gang allegation and five additional years on the five-year prior. So that's 21 years he basically got shaved off the sentence. So I'm not going to use my discretion and strike the strike. I think the facts of this case warrant that sentence."

The court sentenced Jones to prison for a total of 75 years to life: 50 years to life on count 1 for the first degree murder (25 years to life, doubled as a second strike), plus 25 years to life for the firearm enhancement on count 1 pursuant to section 12022.53, subdivision (d). The court stayed the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) pertaining to count 1, and it stayed the five-year prior serious felony enhancement under section 667, subdivision (a), as to that count.[14]

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[14] At the time of sentencing, section 1385 provided the trial court with discretion to strike an enhancement in the furtherance of justice. However, former subdivision (b) of that section provided: "This section does not authorize a judge to strike any

The court stayed sentence on count 2 pursuant to section 654. The court imposed a concurrent term of six years on count 3 (the three-year upper term, doubled as a second strike).

Jones claims we must remand this matter so the trial court can exercise its discretion whether to strike his section 12022.53, subdivision (d), enhancement pursuant to Senate Bill No. 620. We agree.

At the time of sentencing, section 12022.53, subdivision (d), provided: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), [including murder], personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." Imposition of this enhancement was mandatory. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363.)

Senate Bill No. 620 amended section 12022.53, subdivision (h), effective January 1, 2018. (Stats. 2017, ch. 682, § 2.) The amended subdivision (h) provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required

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prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." Senate Bill No. 1393, effective January 1, 2019, deleted former subdivision (b). (Stats. 2018, ch. 1013, § 2.) The judgment in this case is not yet final; therefore, the new law applies retroactively to Jones. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973; see *People v. Brown* (2012) 54 Cal.4th 314, 319-324.) For this reason, we need not address the trial court's authority to strike the five-year prior conviction enhancement.

to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." This amendment applies retroactively; it may serve to impose a lesser punishment for criminal behavior. (*People v. Brown*, *supra*, 54 Cal.4th at pp. 319-324; *People v. Vela* (2018) 21 Cal.App.5th 1099, 1114.)

We reject the People's argument that remand is unnecessary, because "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) The People base this argument on the court's comments in connection with the *Romero* motion that Jones had already received a break of 21 years when it stayed the gang and prior serious felony enhancements and ran the sentence on count 3 concurrent to the sentence on count 1.

While the trial court indicated an intent to sentence Jones to prison for a significant period of time, it also expressed its willingness to extend a certain amount of leniency. For this reason, we cannot state that the record shows unequivocally that the trial court "would not in any event have stricken a firearm enhancement." (*People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425.) Accordingly, we must remand to give the trial court the opportunity to exercise its discretion pursuant to section 12022.53, subdivision (h). We express no opinion as to how the trial court should exercise that discretion.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for the trial court to exercise its discretion whether to strike the enhancement imposed under section 12022.53, subdivision (d). If the court strikes the enhancement, the court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.